INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Summary of argument	9
Argument:	
I. The Commission rightly concluded that to grant a permit to appellant would violate Section 210 of the Interstate Commerce Act	12
A. The Commission was bound to apply Section 210 as it existed at the time of its decision	12
B. Even under Section 210, as it existed prior to its amendment by the Transportation Act of 1940, dual operations as common and contract carriers by separate corporations under common control were prohibited	18
II. The finding of the Commission that appellant and Ziffrin Truck Lines, Inc. were owned, controlled and managed in a common interest is correct	24
A. The question of control is one of fact	24
B. The finding was supported by substantial evidence	26
III. The Commission properly determined that the dual operations of appellant and Ziffrin Truck Lines, Inc. would not be consistent with the public interest and the national transportation policy	28
Conclusion	32
Appendix	33

CITATIONS

Cases:

American Foundries v. *Tri-City Council*, 257 U. S. 184	16
Boston & Maine Rd. v. *Hooker*, 233 U. S. 97	23
Burnett, Charles, Trucking Co., Inc., Common Carrier Application, 10 M. C. C. 615	4
Chicago, M. & St. P. Ry. Co. v. *Minneapolis Civic Association*, 247 U. S. 490	22
Crozier v. *Krupp*, 224 U. S. 290	16
Dinsmore v. *Southern Express Co.*, 183 U. S. 115	16
Duplex Printing Press Co. v. *Deering*, 254 U. S. 443	16

Cases—Continued. Page

Federal Radio Commission v. *Nelson Bros. Co.*, 289 U. S. 266 18
Gray v. *Powell*, 314 U. S. 402 31
Gregg Cartage Co. v. *United States*, 316 U. S. 74 18
Gregory v. *Helvering*, 293 U. S. 465 22
Griffiths v. *Commissioner*, 308 U. S. 355 22
Gulf Col. & S. F. Ry. v. *Dennis*, 224 U. S. 503 16
Gulf Oil Corp. v. *Lewellyn*, 248 U. S. 71 22
Helvering v. *Reynolds Co.*, 306 U. S. 110 24
Hoerman v. *United States* (W. D. Mo.), decided June 5, 1941 4
Ideal Motors, Inc., Contract Carrier Application, 24 M. C. C. 187 4
Kiesle Trucking Co., Inc., Common Carrier Application, 20 M. C. C. 217 20
Lavine, C. Louis, Inc., Contract Carrier Application, 14 M. C. C. 555 30
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488 23, 24
McDonald v. *Thompson*, 305 U. S. 263 18
Merchants Parcel Delivery Co., Inc., Contract Carrier Application, 21 M. C. C. 93 4
Milstead Contract Carrier Application, 11 M. C. C. 157 30
Munson S. S. Line v. *Commissioner*, 77 F. (2d) 849 22
National Labor Relations Board v. *Lund*, 103 F. (2d) 815 22
New Colonial Ice Co., Inc. v. *Helvering*, 292 U. S. 435 22
New York & New Brunswick Auto Express Co., Inc., Common Carrier Application, 23 M. C. C. 663 19, 30
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294 23
Oilfields Trucking Co.—Purchase—Dunbar, 5 M. C. C. 137 30
Rochester Telephone Corp. v. *United States*, 307 U. S. 125 10, 25, 31
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177 26, 31
South Chicago Coal & Dock Co. v. *Bassett*, 309 U. S. 251 31
Southern Pacific Co. v. *Lowe*, 247 U. S. 330 22
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 22
Stephenson v. *Binford*, 287 U. S. 251 17
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 26
Texas Co. v. *Brown*, 258 U. S. 466 16
Transport Co.—Control-Arrow Carrier Corp., 36 M. C. C. 61 30
United States v. *American Trucking Associations*, 310 U. S. 534 23
United States v. *Chicago North Shore R. Co.*, 288 U. S. 1 23
United States v. *Delaware, Lackawanna and Western Railroad Co.*, 238 U. S. 516 22
United States v. *Lehigh Valley R. R. Co.*, 220 U. S. 257 22
United States v. *Louisville & Nashville R. Co.*, 235 U. S. 314 26
United States v. *Maher*, 307 U. S. 148 17, 18, 31
United States v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 22

Cases—Continued. Page

United States v. *Schooner Peggy*, 1 Cranch 103 15

Universal Service Inc.—Purchase—W. R. Arthur & Co., Inc., 15 M. C. C. 247 ..... 20, 21

Wickard v. *Filburn*, No. 59 this Term, decided November 9, 1942 18

Ziffrin, Incorporated, Contract Carrier Application, 33 M. C. C. 155 13

Ziffrin Truck Lines, Inc., Common Carrier Application, 6 M. C. C. 722 13

Statutes:

Motor Carrier Act, 1935, c. 722, 49 Stat. 543:

Sec. 202 (a) 33

Transportation Act of 1940, c. 722, 54 Stat. 898:

Sec. 1 ..... 31, 33

Interstate Commerce Act, February 4, 1887, c. 104, part I, 24 Stat. 379, as amended:

Sec. 202 (a) (49 U. S. C. 302) 34

Sec. 203 (49 U. S. C. 303) 8, 19

Sec. 204 (49 U. S. C. 304) 34

Sec. 207 (49 U. S. C. 307) 17

Sec. 209 (49 U. S. C. 309) 35

Sec. 210 (49 U. S. C. 310) 11, 12, 19, 29, 38

Miscellaneous:

51st Annual Report of the Interstate Commerce Commission (1937) 5

84 Cong. Rec. 5871 24

H. Rep. No. 1217, 76th Cong., 1st Sess 24

H. Rep. No. 2832, 76th Cong., 3d Sess 23

S. Rep. No. 433, 76th Cong., 1st Sess 24

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 245

ZIFFRIN, INCORPORATED, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The district court filed no opinion. Its findings of fact and conclusions of law (R. 62–66) are not officially reported. The report of the Interstate Commerce Commission (R. 13–35) appears in 28 M. C. C. 683.

JURISDICTION

The final decree of the district court was entered on June 4, 1942 (R. 66). The petition for appeal

was presented on June 10, 1942 (R. 68), and was allowed on the same day (R. 73). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and by Section 205 (g) of the Interstate Commerce Act, Part II,[1] c. 498, 49 Stat. 543 (49 U. S. C. 305 (h)).

QUESTIONS PRESENTED

1. Whether, upon finding that appellant contract carrier corporation and a common carrier corporation (Ziffrin Truck Lines, Inc.) were owned, controlled and managed in a common interest, the Interstate Commerce Commission rightly concluded that to grant a permit to appellant would violate Section 210 of the Interstate Commerce Act.

2. Whether the finding of the Commission that appellant and Ziffrin Truck Lines, Inc., were owned, controlled and managed in a common interest i correct.

3. Whether the Commission properly determined that the dual operations of appellant and

[1] This statute was formerly entitled the Motor Carrier Act, 1935, but was retitled "part II of the Interstate Commerce Act" by Section 15 of the Act of September 18, 1940, c. 722, 54 Stat. 898 (the Transportation Act of 1940). It will be hereafter cited as the Interstate Commerce Act in accordance with Section 1 of the Transportation Act of 1940.

Ziffrin Truck Lines, Inc., would not be consistent with the public interest and the national transportation policy.

STATUTES INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, the Transportation Act of 1940, and the Interstate Commerce Act, Part II, in effect on and before the date of the Commission's order of May 29, 1941, are reproduced in the Appendix, *infra,* pp. 33–39.

STATEMENT

Appellant motor carrier filed an application on February 4, 1936, with the Interstate Commerce Commission for a permit to continue designated contract carrier operations under the "grandfather" clause of Section 209 (a) of the Interstate Commerce Act (R. 94A, 14). Following the practice adopted for expediting the numerous applications pending before the Commission, the application was referred to a field representative to investigate the nature and extent of appellant's operations (see R. 40). Later, as a result of his report, the Commission issued a "compliance" order authorizing appellant to engage in certain contract carrier transportation. This order also provided "that if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting

forth the grounds relied upon in opposing the granting of the said authority and requesting that the issuance of such permit be withheld pending further investigation and order by the Commission. Otherwise, such protests shall be denied." [2] (R. 38–39.) Protests were filed and requests for a formal hearing were received by the Commission, all of which were served upon the appellant (see R. 15, 110). These protests called particular attention to the relationship of appellant to Ziffrin Truck Lines, Inc., (Docket No. MC 2510), a common carrier by motor vehicle, and alleged that the issuance of the permit under the compliance order was in violation of Section 210 (before amendment by the Transportation Act of 1940) prohibiting dual operations. Following its usual

[2] As to the effect of a "compliance" order, the United States District Court for the Western District of Missouri said in *Hoerman* v. *United States*, District Court for Western District of Missouri, decided June 5, 1941, not reported:

> The whole force of Point I, however, depends upon the assumption that the Commission had once granted a certificate to plaintiff. But it had never done that. The Commission only had granted a conditional permit (called a "compliance" order), reserving jurisdiction ultimately to grant or deny the application. (There was such a multitude of applications under the "grandfather" clauses that no course was practical other than to grant temporary permits and defer final action.) Nothing in the act forbids such a reservation of jurisdiction.

See also *Ideal Motors, Inc., Contract Carrier Application*, 24 M. C. C. 187; *Merchants Parcel Delivery Co., Inc., Contract Carrier Application*, 21 M. C. C. 93, 94; *Charles Burnett Trucking Co., Inc., Common Carrier Application*, 10 M. C. C. 615, 616.

procedure, the Commission rescinded the compliance order and entered an order directing that appellant's application be set for formal hearing. Included in this order was notice that inquiry would be made into the relationship between appellant and Ziffrin Truck Lines, Inc. (R. 42–44.)

Hearing was had on September 12 and 13, 1938 (R. 132, 263), at which appellant's application was opposed by various motor and rail carriers (R. 111). Appellant introduced evidence in support of its claim of "grandfather" rights and evidence was also received respecting the relationship between appellant and Ziffrin Truck Lines, Inc., the common carrier company (R. 134–356).

Following this hearing, the examiner filed his proposed report and recommended order (R. 108) to which exceptions were filed by both appellant and protestants (see R. 7). Oral argument was had before Division 5 of the Commission (R. 422). On May 29, 1941, the Commission, Division 5, issued its report and order wherein it found that the granting of the permit sought would result in a violation of Section 210, as amended by the Transportation Act of 1940,[3] and, therefore,

[3] The Transportation Act of 1940 (c. 722, 54 Stat. 898) was approved on September 18, 1940. The oral argument before the Commission occurred on October 27, 1939, but the order of the Commission was not issued until May 29, 1941 (R. 422, 35–36). This delay was not untoward because 78,819 applications had been filed under the "grandfather" clause before Febtuary 12, 1936. 51st Annual Report of the Interstate Commerce Commission, p. 71 (1937).

denied the application (R. 13–14). Thereafter appellant filed a petition for reconsideration, reargument, and rehearing, which was denied by the full Commission on September 29, 1941 (R. 44).

The report of the Commission, Division 5, upon which the denial order was based, recited the history of appellant's operations and found that on July 1, 1935, they were those of a contract carrier for the transportation of the following: alcoholic liquors from Lawrenceburg and Louisville to Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend; returned shipments of alcoholic liquors, empty containers, labels, and other liquor-distillery supplies from Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend to Lawrenceburg and Louisville; oleomargarine from Indianapolis to Cincinnati and Peoria; canned and preserved food products from Indianapolis to Cincinnati and Chicago; meats and packing-house products from Chicago to Indianapolis; and waste paper board from Indianapolis to Chicago and Aurora (R. 24).

The report, after noting that Ziffrin Truck Lines, Inc., a common carrier company, had been granted a certificate as a common carrier of general commodities, with certain exceptions, to serve a territory encompassing all but two points (Aurora and Terre Haute) served by appellant, and that appellant's operations to these points

were necessarily conducted over the routes or within the territory served by the common carrier company, proceeded to a consideration of the relations between appellant and the common carrier company, that being one of the principal issues raised by the protests (R. 33). The report called attention to the similarity in the names of the two carriers and to the fact that their offices were in the same city. It then found that Sam Ziffrin was the common president of both companies; that he owned 98 percent of the stock of and managed the common carrier company; that he personally owned 49½ percent of appellant's stock and that, with his sister, he owned 50½ percent of its stock; that trucks were registered in the names of both the appellant and the common carrier company; that the same driver frequently operated a truck carrying shipments in one direction for appellant and, on the return trip, for the common carrier company; and that many of the vehicles displayed the names of both companies (R. 27). From these and other findings and upon consideration of the whole record, the Commission announced its ultimate finding that "applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, are owned, controlled, and managed in a common interest" (R. 33–34).

Proceeding to the applicability of Section 210, as amended by the Transportation Act of 1940, the

Commission determined that the corporate separation was insufficient to obviate the prohibition of the statute since the grant of a permit to appellant would place in the hands of the same "person", as defined in Section 203,[4] authority to conduct operations both as a common and a contract carrier "in respect of the same commodities and between the same points" (R. 29–32). The continuance of such dual operation by appellant and the common carrier company was found not to be consistent with the public interest and the national transportation policy, as defined in Section 1 of the Act of September 18, 1940, c. 722, 54 Stat. 898 (Appendix, *infra*, pp. 33–34) (R. 34). Accordingly, the Commission denied appellant's application (R. 36).

Following this denial, appellant instituted a suit to annul and set aside the Commission's order. Hearing was held by a statutory court of three judges on January 17, 1942, at which time appellant introduced a certified copy of the testimony and exhibits before the Commission and also new and additional evidence[5] intended to show irreparable injury resulting from the Commission's order. This evidence is part of the record herein.

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[4] Sec. 203 (a) (1) (49 U. S. C. 303) provides that—

> The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

[5] This evidence was received subject to the Government's objections (R. 86, 87).

On June 4, 1942, the court below filed its special findings of fact and conclusions of law and dismissed the proceedings for want of equity (R. 62–65). Specifically, the court below found that there was substantial evidence to support the findings, conclusion, and order of the Commission and "that the law is with the defendants" (R. 65).

SUMMARY OF ARGUMENT

I

Upon finding that appellant contract carrier corporation and Ziffrin Truck Lines, Inc., a common carrier corporation, were owned, controlled and managed in a common interest, the Interstate Commerce Commission was plainly forbidden to issue appellant a permit as a contract carrier because of Section 210 of the Interstate Commerce Act as it existed at the time of the Commission's decision. Before judgment, courts must apply to civil cases the effective amendments to applicable statutes; *a fortiori,* this rule must be applied to an administrative tribunal where its action operates *in futuro.* Since the "grandfather" clause (sec. 209) confers merely a special privilege, the application of this rule would not interfere retroactively with vested interests. There is a further absence of vested rights here for the "grandfather" privileges, not having been passed upon, remained inchoate.

In any event, the dual operations were prohibited by the original Section 210. The Commission so interpreted the statute in other cases and was justified in disregarding the corporate fiction here involved; otherwise, the policies of that section would be thwarted. Courts will not lightly upset a settled administrative construction, especially where, it is submitted, Congress in its amendment to Section 210 merely intended to ratify the Commission's construction.

II

Whether appellant and Ziffrin Truck Lines, Inc., were owned, controlled and managed in a common interest was a question of fact to be determined by the Commission. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146.

The finding of the Commission that the corporations were controlled in a common interest must be sustained since supported by substantial evidence. The record discloses that appellant and Ziffrin Truck Lines were outgrowths of the operations of Sam Ziffrin, an individual engaged in the trucking business prior to 1933. Although two corporations were formed, they were managed as a single enterprise by Mr. Ziffrin. Stock control in the two companies resided in Mr. Ziffrin, his wife and sister. They and other members of his family were employed in the operations of the

companies. Both companies had the same offices and terminals in Chicago and Indianapolis. In some instances, they used the same equipment and shared employees. Many of the trucks were registered in the names of both companies and both names were painted on them. These facts and others appearing of record afford a rational basis for the Commission's finding of common control and management.

III

The Commission properly determined that the dual operations as contract and common carriers of appellant and Ziffrin Truck Lines, Inc., which conducted operations "over the same route or within the same territory" (sec. 210), would not be consistent with the public interest and the policy of the Act, as required by Section 210. The Commission was prevented by this section from granting appellant a permit unless *"for good cause shown"* it should find that the dual operations would not contravene the public interest and national transportation policy. [Italics supplied.] Appellant failed to satisfy the statutory burden, and the evidence revealed the vices inherent in the relationship of the two corporations. The reasons for the enactment of Section 210 demonstrate that it was designed to prevent unfair competition between the two classes of motor carriers through solicitation of business and the opportunity to offer both kinds of service for the same

commodities between the same points. For these reasons, the determination of the Commission must be sustained.

ARGUMENT

I

THE COMMISSION RIGHTLY CONCLUDED THAT TO GRANT A PERMIT TO APPELLANT WOULD VIOLATE SECTION 210 OF THE INTERSTATE COMMERCE ACT

A. The Commission Was Bound To Apply Section 210 as It Existed at the Time of Its Decision

Section 210 of the Interstate Commerce Act (Appendix, *infra*, p. 38), as amended by the Transportation Act of 1940 (Appendix, *infra*, pp. 38–39), declares that "no person * * * shall hold a permit as a contract carrier * * * if * * * any * * * person under common control, holds a certificate as a common carrier." As previously indicated (n. 4, *supra*) the term "person," is specifically defined in the Act to include a corporation, and the issuance of permits under the "grandfather" clause of Section 209 is made specifically subject to the provisions of Section 210 (see Appendix, *infra*, p. 36). In the present case, the Commission concluded that appellant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, were owned, controlled, and managed in a common interest (R. 33–34). Since appellant was thus clearly a person under common control with a person, Zif-

frin Truck Lines, Inc., which held a certificate as a common carrier,[6] the issuance of a permit to appellant was plainly forbidden by the express language of Section 210, as it was at the time of the Commission's decision.[7]

Appellant seeks, however, to avoid this obvious result by urging (Br. 41–43, 61) that Section 210, in the form adopted in the Transportation Act of 1940, cannot be applied to a situation such as the present one, where the record before the Commission's examiner was made prior to the passage of that Act, even though the decision of the Commission was issued thereafter (see Statement, p. 5, and n. 3, *supra*). It contends too (Br. 32–33) that, prior to its amendment by the Transportation Act of 1940, Section 210 would not have applied where

[6] Such a certificate was granted in *Ziffrin Truck Lines, Inc., Common Carrier Application*, 6 M. C. C. 722.

[7] Appellant claims (Br. 31) that it was denied the right to submit evidence as to its compliance with Section 210, as amended, and that it should have been given opportunity to submit evidence to the Commission under the law as it now exists. But appellant did not raise this ground for voiding the Commission's denial of its application until this case was instituted in the district court. In its petition to the Commission for reconsideration, reargument, and rehearing following final decision, appellant made no request to be allowed to show compliance with Section 210. And, while this case was pending in the district court, the Commission entertained a petition proposing a plan for the separation of the two companies. Its report denying this petition appears in *Ziffrin, Incorporated, Contract Carrier Application*, 33 M. C. C. 155.

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two separate corporations under common control were respectively engaged as common and contract carriers. But, assuming for the moment the correctness[8] of the latter proposition, it is clear that there is a basic error in appellant's

[8] Assuming that the Commission had no authority to consider whether there was common control between the two corporations under Section 210 before its amendment, the Commission in its notice of hearing to appellant nevertheless gave appellant ample notice that such issues would be considered. This notice read as follows (R. 43):

> Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc. (No. MC–2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935.

Thus, even if authority to inquire into the issue of common control can be considered as first having been actually granted under the amended Section 210, there is no ground for any contention that appellant was denied an opportunity to furnish proof on this issue.

Appellant objects (Br. 47–48) to this notice because of its reference to Section 5 (6) which applied only to railroads, although the exact nature of the objection is not clear. In any event this objection is frivolous, because, as both the Commission and the lower court recognized in their decisions (R. 25–26, 63) this reference was merely intended to show the scope of the issues and not as any indication that Section 5 (6) was actually to be applied to appellant.

first contention and that the Commission was instead bound to apply Section 210 in its amended form to appellant's case.

It is a fundamental principle applicable to civil cases that where a law is amended subsequent to a decision therein by a lower court but prior to the disposition of the case involving such law on appeal, the appellate court is bound to apply the amended law to the case. This proposition was recognized by this Court as early as 1801 in the case of *United States* v. *The Schooner Peggy,* 1 Cranch 103, 110. Speaking through Mr. Chief Justice Marshall the Court there declared:

> It is, in general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. * * * In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

See also *Dinsmore* v. *Southern Express Company &c.*, 183 U. S. 115, 120; *Gulf Col. & S. F. Ry.* v. *Dennis*, 224 U. S. 503; *Texas Co.* v. *Brown*, 258 U. S. 466, 474; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Crozier* v. *Krupp*, 224 U. S. 290, 302. That this same proposition applies as well to a trial court, where there is an amendment of law subsequent to the institution of a suit but before the court's decision thereon, was made clear in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464, in which the action of a trial court in applying provisions of the Clayton Act to a Sherman Act suit instituted prior to the passage of the Clayton Act was sustained. The Court stressed the fact that injunctive relief operating *in futuro* was involved, but here the Commission in granting or denying appellant a permit was concerned entirely with the future. *A fortiori*, we submit that the same rule must be applied with respect to the Commission as an administrative tribunal, and that the Commission was required to apply the law as it existed at the time of decision in the absence of any express statutory mandate to the contrary.

There is in the Transportation Act of 1940 neither express nor implied mandate to the contrary. Certainly the reasons for forbidding dual operations as common and contract carriers by two corporations under common control were as compelling with respect to carriers on whose applications

testimony had been taken but decision not yet issued as in the case of those upon whose applications evidence had not yet been submitted. It is to be noted, also, that shortly before the passage of this legislation, the opinion in *United States* v. *Maher*, 307 U. S. 148, 155, indicated that rights under "grandfather" applications did not become fixed until the time when the Commission "passed upon the application." Since the Commission obviously does not "pass upon the application" until it renders its decision, Congress must have intended that the amended Section 210 was to be applied in all "grandfather" cases where the Commission had not yet rendered its decision.

Such a construction is not one which might lend itself to the objection of retroactively interfering with vested rights. Thus it is settled that, in general, carriers have no vested rights in the use of public highways which are not subject to public regulation. *Stephenson* v. *Binford*, 287 U. S. 251, 264. Also, under the Motor Carrier Act in particular, even an actually issued permit or certificate conveys no such vested right,[9] and it has frequently been recognized that the "grandfather" clause confers merely a special privilege, which

[9] Section 207 (b) of the Motor Carrier Act, 1935 (49 U. S. C. 307 (b)), declares:

> No certificate [for common carriers] issued under this part shall confer any proprietary or property rights in the use of the public highways.

Unquestionably, the same is true of a contract carrier permit.

can be extended only to carriers plainly within its terms. See, *e. g.*, *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83; *McDonald* v. *Thompson*, 305 U. S. 263, 266. See also *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 282. Even more plainly is there an absence of vested rights where, as here, the "grandfather" privileges remain inchoate because they have not yet been "passed upon". *United States* v. *Maher*, 307 U. S. 148, 155. Under the doctrine of the *Maher* case, appellant, in order to be entitled to a "grandfather" permit, was required to continue its operations until the Commission "passed upon" its application, which in appellant's case was subsequent to the Transportation Act of 1940 (see Statement, p. 5, and n. 3, *supra*,). Since the impact upon appellant of the regulatory scheme of the Motor Carrier Act, as amended by the Transportation Act of 1940, was thus contingent in part upon appellant's subsequent acts, no question of retroactivity is presented. *Wickard* v. *Filburn*, No. 59 this Term, decided November 9, 1942, pamphlet pp. 15–16.

B. Even Under Section 210, as it Existed Prior to its Amendment by the Transportation Act of 1940, Dual Operations as Common and Contract Carriers by Separate Corporations Under Common Control Were Prohibited

Section 210, as enacted by the Motor Carrier Act, 1935, and prior to amendment by the Trans-

portation Act of 1940, provided as follows (49 Stat. 543, 554):

> No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part.

In Section 203 (a) (1) "person" then, as now, was defined to include a corporation (n. 4, *supra*).

As the Commission recognized in the present case (R. 31–32; see also R. 121–125), it had consistently held in decisions under the foregoing language that dual operations by two corporations under common control and management were as much prohibited as those by the same individual or corporation. Thus, in *New York & New Brunswick Auto Express Co., Inc., Common Carrier Application*, 23 M. C. C. 663, 671, the Commission declared:

> Motor Service contends that each applicant is a separate entity and therefore a separate person under the definition shown in section 203 (a) (1) of the act and that the application of each should be determined independently of the other regard-

> less of the terms of section 210. It argues that the corporations, were legitimately formed in good faith, a considerable period before the enactment of the Federal statute regulating motor carriers, each to serve a specific purpose; that there has been no concealment of the common ownership of the two corporations by applicants; that each has complied with our various regulations under the act; and that each is entitled to the authority sought in their respective applications under the applicable "grandfather" clauses of the act. We are unable to agree with applicant's contentions. The Commission and the courts have consistently held that corporate entities may be disregarded by the Commission in circumstances where such action is necessary to permit the proper exercise of statutory regulatory power.
> * * *

This same doctrine had earlier been applied by the Commission in *Universal Service Inc.—Purchase—W. R. Arthur & Co., Inc.*, 15 M. C. C. 247, 250, and had also been recognized in *Kiesle Trucking Co. Inc., Common Carrier Application*, 20 M. C. C. 217.

The Commission's action in disregarding the corporate fiction in the foregoing cases and in the present case was clearly justified. In the *Universal Service* case, *supra*, the Commission further explained the basis for these cases as follows (p. 250):

> We are not convinced that the objectionable features [10] incident to dual operations by a single carrier, which we are authorized to prevent under the provisions of section 210, would be obviated here merely by the expedient of dividing the rights for operation by separate corporate entities.
> * * *

That the policy against discrimination embraced in Section 210 would be thwarted [11] if dual operations as common and contract carriers were permitted by separate corporations under common control and management seems hardly open to question. The Commission, as it clearly recognized (R. 29–30; see also R. 122–123), was in these cases merely applying the familiar rule of

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[10] In its present report the Commission declared (R. 32–33):

> The discrimination which the section is intended to obviate is always present where the same persons are able to offer both kinds of service in respect of the same commodities and between the same points. Applicant's president solicits traffic for the common carrier company and he conceded that its customers approached him with reference to entering into contracts with applicant and that there was competition between the two companies.

The discrimination referred to arises from the fact that ordinarily contract carriers may make a special rate to fit a particular shipper, whereas common carriers cannot (see R. 122).

[11] While in the present case it does not appear that these corporations were organized after the passage of the Motor Carrier Act for the express purpose of violating Section 210, in view of the common ownership and management which exists, dual operations by the two corporations would for the future clearly be contrary to the policy of Section 210.

law that, where common control and management is an actuality, the corporate entity may properly be disregarded to prevent evasion of statutes or the defeating of public convenience. The doctrine was explained by this Court in *New Colonial Ice Co., Inc.* v. *Helvering*, 292 U. S. 435, 442:

> As a general rule a corporation and its stockholders are deemed separate entities * * *. Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private right. * * *

What is in essence this same basic principle has been applied in numerous other cases.[11]

Where as here, there has been a settled construction of a statute by the administrative authorities entrusted with its application, such construction will not be lightly disturbed by the

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[11] *Griffiths* v. *Commissioner*, 308 U. S. 355; *Gregory* v. *Helvering*, 293 U. S. 465; *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Association*, 247 U. S. 490; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330; *United States* v. *Delaware, Lackawanna and Western Railroad Co.*, 238 U. S. 516; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 501; *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *Munson S. S. Line* v. *Commissioner*, 77 F. (2d) 849 (C. C. A. 2d); *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (C. C. E. D. Wis.).

courts. See, *e. g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97. It has been held that this is especially true of constructions by the Commission of the language of the Motor Carrier Act in view of the fact that the Commission proposed it to Congress. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Appellant, however, in attacking the Commission's construction of the original Section 210, points to the fact that the language of this section was changed in 1940 in order to cover specifically separate corporations under common control (Br. 36–37). It emphasizes the fact that the conference report (H. Rep. No. 2832, 76th Cong. 3d sess.) on the bill which became the Transportation Act of 1940, declared that this new language "amends Section 210 * * * so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with such person." The legislative history throws little light on the purpose of this change in language. We think, however, that neither the change in the language nor the foregoing statement in the committee report indicates that Congress thought it was making any substantive change in Section 210 as it already had been applied. We believe

that, especially in view of the important part which the Commission took in the drafting of the Transportation Act of 1940 (see S. Rep. No. 433, 76th Cong., 1st sess., pp. 1–2; H. Rep. No. 1217, 76th Cong., 1st sess., pp. 1–2; 84 Cong. Rec. 5871), this amendment was merely intended to ratify and approve the construction which the Commission had already placed upon Section 210. Unquestionably, the mere reenactment by Congress of Section 210 without change after its prior construction by the Commission would have been a persuasive indication of Congressional approval: *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114, 115; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488. Here, it is submitted, Congress simply intended to indicate its approval and ratification of the past construction in more positive form by spelling out and adopting the past administrative construction.

II

THE FINDING OF THE COMMISSION THAT APPELLANT AND ZIFFRIN TRUCK LINES, INC. WERE OWNED, CONTROLLED AND MANAGED IN A COMMON INTEREST IS CORRECT

A. The Question of Control is One of Fact

Where, as here, the application of Section 210 hinges upon a corporate relationship and the existence of common control of corporations, the issue belongs to the administrative routine; its de-

termination has therefore been confided to the Commission. Sections 202 (a) and 204 of the Interstate Commerce Act. See also Section 210. (Appendix, *infra*, pp. 34–35, 38–39). Under well settled principles this determination will not be disturbed if rationally supported.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, one of the issues was whether the appellant telephone company was subject to the jurisdiction of the Federal Communications Commission by reason of its being *controlled* by the New York Telephone Company. The Communications Commission had so found, and, with respect to its finding, this Court said (pp. 145–146):

> The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. * * *

Although the controlling company owned only one-third of the stock of the Rochester Telephone Company, it was held that actualities may not be disregarded and that control may be manifested in other ways than in terms of percentage of stock interest.

This decision recognized that the question of control is one of fact, and that where its determination is interwoven in the grant of administrative powers the courts will sustain the finding of the administrative body when predicated on a "rational basis" (p. 146). See also *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–185; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.

B. The Finding Was Supported by Substantial Evidence

The evidence clearly shows that both the appellant and Ziffrin Truck Lines, Inc., were outgrowths of the individual operations of Sam Ziffrin. Mr. Ziffrin was in the trucking business prior to 1933 (R. 238–239). The exigencies of his business and the registration requirements of the State of Indiana led to the formation of separate companies (R. 16, 111, 239). But this corporate segregation was not reflected in the internal management of the business (see R. 254). Mr. Ziffrin remained the operator of both concerns (R. 253, 255).

Many of the witnesses called by appellant in proof of the nature and extent of its "grandfather" operations testified that their dealings were with Mr. Ziffrin and that their contracts with Ziffrin, Inc., were negotiated by him. See,

e. g., the testimony of M. F. Chandler, Traffic Manager of Frankfort Distilleries (R. 165, 168), Frank Luther, General Traffic Manager of Distillers Corp.[13] (R. 181, 183, 187, 188), Edward Gusky, General Traffic Manager of Schenley Distillers (R. 204, 215), R. C. Johnson, Treasurer of Beveridge Paper Co. (R. 230), and of B. M. Axtell, General Traffic Manager of Stokeley Bros. & Co. (R. 246).

Mr. Ziffrin's own testimony throws light on the relationship and management of the two companies. Appellant's total capital stock consists of 1,000 shares owned as follows (R. 297, 298):

Sam Ziffrin	495 shares.
Rose Levi	15 shares.
Lewis Berger	100 shares.
S. O. Berman	390 shares.

The directors are Mr. Ziffrin, Rose Levi and S. O. Berman (R. 253). Rose Levi is Mr. Ziffrin's sister (R. 298). Mr. Ziffrin is president and general manager of the company; Mrs. Levi is treasurer; Mr. Levi is an accountant; and Esther Ziffrin, the president's wife, is assistant treasurer (R. 253, 279–280, 297).

Mr. Ziffrin owns 98 per cent of the stock of Ziffrin Truck Lines, Inc.; the remaining stock is owned by his wife and two sons. The stockholders

[13] This witness testified that he dealt with Mr. Ziffrin as representing both the common and contract carrier corporations (R. 188).

comprise the board of directors. (R. 254, 299.) Mr. Ziffrin is president, his wife is treasurer, and his sons are vice presidents (R. 255, 279–280).

Acting for appellant, Mr. Ziffrin handles the business contracts; he testified that he "contacts" the accounts and personally handles 90 per cent of appellant's contracts. (R. 299–300).

The record reveals that both companies have the same offices and terminals in Indianapolis and Chicago (R. 290, 301) and share certain employees (R. 257, 301); the same equipment is frequently used in handling both companies' shipments (R. 322–323); the same driver may handle outbound shipments for appellant and, on the return trip, incoming shipments for Ziffrin Truck Lines, Inc. (R. 323); many of the trucks are registered in the names of both companies, and both names are painted on the trucks (R. 270, 304).

These facts and others appearing of record afford a solid foundation for the finding of common control and operation, and appellant's brief in fact makes no serious contentions to the contrary.

III

THE COMMISSION PROPERLY DETERMINED THAT THE DUAL OPERATIONS OF APPELLANT AND ZIFFRIN TRUCK LINES, INC. WOULD NOT BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY

The Commission found that there were only two points which the record showed appellant has been

serving as a contract carrier which are not involved in the authority granted to Ziffrin Truck Lines, Inc., and even as to these points operations would necessarily be conducted over the routes or within the territory served by the common carrier company. Moreover the two points are actually on routes served by the common carrier, and the latter would not be precluded from interchanging with other common carriers traffic destined to the two points and still retaining substantial portions of the haul. (R. 33, 34–35.) Consequently, it is apparent that the operations of the two companies were conducted "over the same route or within the same territory" (sec. 210). Section 210 therefore became operative to prevent the Commission from granting a permit unless "*for good cause shown*" it should find that the dual operations would be consistent with the public interest and the policy of the Act. [Italics supplied.] See Section 202 (a) of the Motor Carrier Act, 1935, and Section 1 of the Transportation Act of 1940, Appendix, *infra*, pp. 33–34).

Appellant takes the position that having found present the dual operations described in Section 210, it is incumbent on the Commission to grant the application unless it shall affirmatively appear by competent evidence that such operation is inconsistent with the public interest and the national transportation policy (Br. 50). Obviously, such

a position is untenable. The prohibition attaches by operation of the statute and persists until the Commission finds on competent evidence that the dual operation is consistent with the public interest and the national transportation policy. When such evidence is absent, the Commission must, under the statute, deny the application. The burden thus rests with the applicant. Here appellant failed to adduce any evidence to show that the dual operation would not offend against the public interest and national transportation policy. On the contrary, the evidence particularly demonstrated some of the vices inherent in the relationship of appellant to Ziffrin Truck Lines, Inc. (R. 188–190, 257, 301, 322, 323).

The underlying reasons for the enactment of Section 210 are obvious. It was designed to prevent unfair competition between the two classes of motor carriers through solicitation of business and the opportunity to offer both kinds of service for the same commodities between the same points. *Transport Co.—Control-Arrow Carrier Corp.*, 36 M. C. C. 61, 80; *New York & New Brunswick Auto Express Co., Inc., Common Carrier Application*, 23 M. C. C. 663, 676; *C. Louis Lavine, Inc., Contract Carrier Application*, 14 M. C. C. 555, 557; *Milstead Contract Carrier Application*, 11 M. C. C. 157, 162; *Oilfields Trucking Co.—Purchase—Dunbar*, 5 M. C. C. 137, 139. The Commission is

charged with the duty of administering the Act so as to preserve the inherent advantages of all modes of transportation, to promote "efficient service and foster sound economic conditions * * *" and "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations * * * or unfair or destructive competitive practices * * *" (Section 1 of the Transportation Act of 1940; see also Section 202 (a) of the Motor Carrier Act, 1935, Appendix, *infra*, pp. 33–34). The Commission was bound to follow this legislative mandate, and it found that the dual operation which it had under scrutiny could not be authorized consistently with the public interest and the policy of the Act (R. 33–34). This was an administrative determination which rested peculiarly within the province of the Commission. The record supports (R. 16, 22, 27–29, 33; see also pp. 26–28, *supra*) the finding in the Commission's report which denies the continuance of this dual operation. This finding must therefore be sustained. *Gray* v. *Powell*, 314 U. S. 402, 412, 413; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *United States* v. *Maher*, 307 U. S. 148, 154; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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APPENDIX

Section 202 (a) (the declaration of policy) of the Motor Carrier Act, 1935 (49 Stat. 543) provides:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Section 1 (the declaration of policy) of the Transportation Act of 1940 (54 Stat. 898) provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation

of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 202 (a) (49 U. S. C. 302 (a)) of the Interstate Commerce Act, Part II, provides:

The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

Section 204 (49 U. S. C. 304) provides in part:

It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

Section 204, as amended (49 U. S. C. 304) by the Transportation Act of 1940, provides in part:

It shall be the duty of the Commission—

* * * * *

(7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

Section 209 (49 U. S. C. 309) provides:

(a) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier

by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing

provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that

the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Section 210 (49 Stat. 554), as originally enacted in the Motor Carrier Act, 1935, provided:

No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part.

Section 210, as amended (49 U. S. C. 310) by Section 21 (a) of the Transportation Act of 1940 provides:

> Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—
>
> (1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and
>
> (2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory.

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